STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TDS Metrocom, LLC	**)**	
-vs-	**)**	
Illinois Bell Telephone Company	**)**	
	)	**03-0553**
Complaint concerning imposition of unreasonable	**)**	
And anti-competitive termination charges by	**)**	
Illinois Bell Telephone Company.	**)**	

DRAFT PROPOSED ORDER OF SBC ILLINOIS

Louise A. Sunderland
Illinois Bell Telephone Company
225 West Randolph Street, Floor 25D
Chicago, Illinois 60606
(312) 727-6705

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Illinois Bell Telephone Company ("SBC Illinois" or "the Company"), by its attorney, hereby files its Draft Proposed Order in the above-captioned proceeding.

I. PROCEDURAL HISTORY

This proceeding was initiated pursuant to a complaint ("Complaint") filed by TDS Metrocom, LLC ("TDS") on September 12, 2003.

On November 4, 2003, SBC Illinois filed its answer to the Complaint. On December 4, 2003, TDS witnesses Matthew Loch (TDS Exs. 1.0 and 1.0P) and Jennifer Sterns (TDS Exs. 2.0 and 2.0P) filed Direct Testimony. SBC Illinois witnesses Brian Gillespie (SBC Ill. Exs. 1.0 and 1.0P), Dr. Alan S. Frankel (SBC Ill. Exs. 2.0 and 2.0P), Ronald Flitsch (SBC Ill. Exs. 3.0 and 3.0P), and James W. Longua (SBC Ill. Ex. 4.0) filed Direct Testimony on January 22, 2004. Staff witnesses A. Olusanjo Omoniyi (Staff Ex. 1.0) and Robert F. Koch (Staff Ex. 2.0) subsequently filed their Direct Testimony on February 11, 2004. Rebuttal Testimony was filed by SBC Illinois witnesses Gillespie (SBC Exhibit 1.1), Frankel (SBC Ill. Ex. 2.1), and Flitsch (SBC Ill. Ex. 3.1) on February 25, 2004. On March 10, 2004, TDS filed witness Loch's Rebuttal Testimony (TDS Ex. 1.5).

Evidentiary hearings were held on April 29, 2004. The parties agreed to admit by stipulation the pre-filed testimony of the TDS, SBC Illinois, and Staff witnesses and any accompanying attachments and to waive cross-examination. The Administrative Law Judge instructed SBC Illinois to late file surrebuttal testimony in lieu of a ruling on SBC Illinois' Motion to Strike certain of TDS' rebuttal testimony. SBC Illinois filed the Surrebuttal Testimony of witness Michelle Kent (SBC Ill. Ex. 5.0) on May 14, 2004. Initial Briefs were filed by TDS, SBC Illinois and Staff on June 11, 2004. Reply Briefs were filed on June 25, 2004, by the same parties.

II. TERMINATION CHARGE METHODOLOGY

A. TDS' COMPLAINT

B. TDS' POSITION

C. SBC ILLINOIS' POSITION

SBC Illinois explained that its contracts and tariffed term plans today require customers terminating service prior to the specified end date of the agreement to pay a charge based on a percentage of what remains on the contract. SBC Illinois referred to this approach as a "forward-looking" termination liability. The amount of the percentage varies by product category and ranges from 25% to 50%. According to SBC Illinois, prior to the filing of TDS' complaint, the Company's tariffs and contracts contained termination liabilities that varied widely by product and service: some were "forward-looking" (i.e., the liability was based on a percentage of what was left on the contract), some were "backwards looking" (i.e., the liability was based on the savings the customer achieved for the contract period already completed) and the size of the liability differed widely. SBC Illinois explained that it had modified its policies applicable to all products and services offered under term agreements (whether tariffs or contracts), and to both new and existing customers. SBC Illinois stated that the only exception would be the ValueLink services subject to the *Ascent Order*, which would continue to be treated in a manner consistent with that *Order*. These new policies were implemented in March of 2004, and are now fully effective in SBC Illinois' tariffs and contracts being entered into on a forward-looking basis.

SBC Illinois contended that TDS was mistaken as to both the relevant legal standard and economic policy considerations applicable in evaluating its termination liability policies. According to SBC Illinois, under general contract law, an early termination liability is a substitute for calculating damages at the point in time when the customer actually breaches the agreement. Thus, these kinds of provisions estimate the economic harm that a contracting party would suffer from early breach. SBC Illinois pointed out that, in the *Ascent* case, there was general agreement that a measure of such harm would be the revenues the Company loses, less any avoidable costs, plus any incremental expenses it incurs. *Ascent Order* at 23-24. SBC Illinois contended that the Commission rejected its 100% termination liability policy because it did not limit SBC Illinois' recovery of damages to lost profits, not because it was based on a percentage of what remained under the contract.

SBC Illinois took the position that its current termination liabilities are consistent with the principles set out in the *Ascent Order*. The Company explained that it had conducted a thorough analysis of all of the products and services it offers under term agreements, identifying both the revenues received and the costs avoided. SBC Illinois then subtracted its avoidable (LRSIC) costs from its revenues for each product and service and ensured that the percentage termination liability applicable to each family of products and services was either at or below the "lost profit" standard. SBC Illinois further pointed out that the levels of the termination liabilities it uses today are substantially lower than the 100% level at issue in the *Ascent* case:

Centrex termination liabilities are 25% of the amount remaining on the term agreement, Usage (including network access lines) termination liabilities are 35% of the amount remaining on the term agreement, and Transport Services/Other termination liabilities are 50% of the amount remaining on the term agreement.

SBC Illinois explained that its approach is consistent with basic market and economic principles. SBC Illinois presented the testimony of Dr. Alan S. Frankel, an experienced economist in the area of antitrust and competition policy analysis. Dr. Frankel explained that termination liability provisions are a common component of term agreements across many industries, which provide benefits to both the supplier and the customer. Dr. Frankel testified that the measure of damages in such agreements would typically be the supplier's expected lost profits. Dr. Frankel further testified that SBC Illinois' policies were conservative, because they assume that all network capacity freed up as a result of the breach can be immediately used to serve another customer. If this were not the case – and it is often not the case – he testified that SBC Illinois' lost profits would equate to total lost revenues.

SBC Illinois also pointed out that its termination liability policies were consistent with the practices of other carriers in Illinois. According to SBC Illinois, all carriers incorporate termination liabilities into their term plans and virtually all of them use a "forward-looking" approach comparable to that used by SBC Illinois (e.g., McLeodUSA, XO, Focal, AT&T, MCI, Allegiance, and Mpower). In fact, TDS is the only CLEC that uses the "give-back-the-unearned-discount" approach. Moreover, SBC Illinois argued that the percentage amounts it charges are either comparable to or much lower than what its competitors charge: many CLECs today charge between 75% and 100% of what remains on the contract for local service, Centrex and transport products. SBC Illinois noted that TDS had not disputed the fact that SBC Illinois' charges are generally much lower than those of its competitors.

SBC Illinois pointed out that TDS had acknowledged that the issues raised by its Complaint had been partially addressed by these lower termination charges. SBC Illinois, however, opposed TDS' suggestion that that the Commission cap SBC Illinois' termination liabilities at 25%. SBC Illinois explained that its existing 25%/35%/50% policies are fully consistent with its financial analyses and that a 25% cap on termination liabilities would be substantially lower than what any other carrier charges in the marketplace. Thus, SBC Illinois contended that any such cap would be arbitrary and not supported by the evidence.

SBC Illinois disputed TDS' claim that its termination liability policies have the effect of removing customers under term agreements from the competitive marketplace. In response to its evidence that three SBC Illinois customers elected not to breach their agreements early to take service from TDS, SBC Illinois argued that TDS had confused competition for an individual customer with competition in the market. SBC Illinois pointed out that competition is intense in a market even though particular customers under contract cannot easily switch suppliers, citing the commercial and residential rental real estate markets as examples. As SBC Illinois explained, there is competition between SBC Illinois, TDS, and other CLECs to recruit customers to enter into term contracts in the first instance. As a contract nears expiration, another round of competition can occur for that customer without requiring any payment of termination liabilities. In addition, SBC Illinois contended that, at any time, there are numerous customers obtaining service on a month-to-month basis not constrained by any term commitment. SBC Illinois also pointed out that competitors can market their services even to customers under contract. While this tends to occur more as contracts near expiration, SBC

Illinois noted that CLECs can assume the remaining term of existing SBC Illinois contracts prior to migrating the customer to the CLEC's own facilities.

To demonstrate that SBC Illinois' termination liability policies do not have the effect of locking up the local exchange marketplace, SBC Illinois presented the results of an extensive analysis of its term agreements. In 2003, for example, 75 percent of usage customers, 77 percent of data/transport customers, and 81 percent of Centrex/PBX customers were either already free from SBC Illinois contracts, could terminate SBC Illinois service at any time without incurring any fee, or would be free to do so before the end of 2004. Another approximately eight percent are operating under SBC Illinois contracts terminating in 2005. In Dr. Frankel's expert opinion, there was absolutely no lock-up of the market from an economic perspective. SBC Illinois pointed out that neither TDS nor Staff had any response to this analysis. SBC Illinois stated that its expert witness had demonstrated that no plausible theory of anticompetitive harm had been advanced in this proceeding.

SBC Illinois disagreed that the *Ascent Order* supported the relief requested by TDS. SBC Illinois pointed out that the *Ascent Order* was limited to the ValueLink services at issue in that proceeding. SBC Illinois further contended that the *Ascent Order* was heavily influenced by marketplace conditions at the time the ValueLink services were introduced. In determining whether the ValueLink termination liabilities should be changed, the Commission evaluated whether customers had assumed those penalties in a "genuinely voluntary fashion" – i.e., whether customers had had "meaningful choice" and "sufficient (if unequal) bargaining power." *Ascent Order* at 22. In concluding that customers had not done so, the Commission relied on the fact that the ValueLink products had been introduced shortly after the implementation of intraMSA presubscription in 1996 and that competition was only just getting started.

SBC Illinois stated that it is now 2004 and there is a substantial level of competition in Illinois for business customers generally and across the entire range of business services. According to SBC Illinois, approximately 79 CLECs provide service in its local service territory, approximately 56 of which provide service exclusively or predominately over their own facilities or over UNEs leased from SBC Illinois. SBC Illinois supplied its current market shares for the products and services at issue in this proceeding. According to SBC Illinois' data, CLECs today serve approximately 35% of the business lines in its serving territory. SBC Illinois stated that the combined CLEC/IXC share of the intraMSA toll market is higher than 35% and that the CLECs' share of the transport service markets is higher yet. SBC Illinois pointed out that it serves less than 20% of the premises equipment market with Centrex service.

SBC Illinois further argued that this competition is not a recent development. According to SBC Illinois, the CLEC market share for business usage and network access lines has grown from 20% in the 3rd quarter of 2000, to 35% in the 3rd quarter of 2003. SBC Illinois explained that competition for intraMSA toll services dates back to the late 1980s and early 1990s. SBC Illinois further stated that its share of the transport marketplace started to decline significantly in the mid-1990's, before the CLECs began to offer local exchange service, and that it has continued to decline. Finally, SBC Illinois pointed out that competition in the premises systems marketplace dates all the way back to the 1970's. SBC Illinois noted that the Commission rejected a CLEC "fresh look" proposal for Centrex agreements in 1995, acknowledging that Centrex service was fully competitive and that customers had had ample alternatives when entering into those agreements. *Order in Docket No. 94-0096/94-0117/94-0146/94-0301, Consol.*, dated April 7, 1995 at 123.

SBC Illinois disputed TDS' suggestion that the 25%/35%/50% profit margins on SBC Illinois' services implied by these termination liabilities are inconsistent with a competitive marketplace. SBC Illinois pointed out that nothing in the record establishes benchmarks for profit margins on competitive services. SBC Illinois also noted that it incurs shared and common costs that must be recovered in the "contribution" (or profit margin) on retail products, because there is no formal shared and common cost mark-up as there is for wholesale products, and the contribution levels on retail services must cover the costs of spare capacity as well. See *Order in Docket No. 02-0864,* adopted June 9, 2004, at 58-59, 222; 83 Ill. Adm. Code § 791.20(n). Thus, argued SBC Illinois, there is no evidence that 25%/35%/50% profit margins are too high relative to the costs that need to be recovered in SBC Illinois' overall rate structure and pointed out that TDS is silent on its profit margins for these services.

SBC Illinois also pointed out that the Illinois General Assembly approved legislation in 2001 that classified all of SBC Illinois' business services competitive as a matter of law and that both this Commission and the FCC approved grant of SBC Illinois' 271 application in 2003. Thus, states SBC Illinois, business customers have, and have had for a considerable period of time, competitive alternatives for all of the products at issue in this proceeding. SBC Illinois contended that these marketplace conditions are very different from those in the *Ascent* case and there is no reason to assume that customers have not made their decisions in a voluntary fashion. According to SBC Illinois, if customers do not like SBC Illinois' offerings, they can take service from another provider.

SBC Illinois argued that TDS had confused the *Ascent Order*'s finding that the "payback the savings" approach is *a* lawful methodology with a finding that it is the *only* lawful methodology. According to SBC Illinois, the Commission reached no such conclusion in the

Ascent Order. SBC Illinois stated that in effect, the Commission was faced with a "baseball arbitration" situation in the *Ascent Order*: the only two options in the record were SBC Illinois' 100% liability policy and some version of "give-back-the-unearned-discount." SBC Illinois explained that the Commission did not consider, and did not rule on, any other methodologies.

SBC Illinois contended that TDS' approach to termination liabilities is not superior from a customer and competitive perspective to SBC Illinois'. SBC Illinois evaluated typical Centrex and DS-1 term agreements and demonstrated that TDS' approach produced higher absolute termination liabilities than SBC Illinois' in over 60% of the months in each contract term. For example, under a typical Centrex contract, SBC Illinois demonstrated that TDS' methodology would produce a termination liability more than twice as high as SBC Illinois' at the midpoint of the contract period. Accordingly, SBC Illinois contended that it would be impossible, based on the record of this proceeding, to find that SBC Illinois' termination liabilities are too high in an absolute sense, as compared to TDS'.

SBC Illinois also disputed Staff's contention that its approach would result in higher termination charges than TDS' approach in all but the "last few months" of a contract term. SBC Illinois pointed out that Staff's example Centrex calculation was based on a calculational error. If this error is corrected, SBC Illinois stated that its methodology produces a lower amount than TDS' methodology for the entire third year of the contract – not just the last few months. In addition, SBC Illinois pointed out that there is no one-year option for Centrex service, which is critical to Staff's calculation. Using actual Centrex rates – rather than the hypothetical example constructed by Staff – SBC Illinois demonstrated that the customer is better off under SBC Illinois' approach for 24 of the 35 months of the term (or 69%). SBC Illinois took the position that the Commission should not conclude that TDS' approach is superior based on incorrect factual assumptions.

SBC Illinois disputed Staff's suggestion that Commission action is appropriate because the size of the termination liabilities under SBC Illinois' contracts can be "enormous," as they are based on percentages "that are as high as 100%." SBC Illinois suggested that Staff had confused the record in the *Ascent* proceeding with the record in this proceeding. SBC Illinois stated that it had stopped using 100% termination liabilities in 2002.

SBC Illinois also pointed out that Staff's position favoring the TDS approach was inconsistent with the informal guidelines that Staff had used both with SBC Illinois and other CLECs in Illinois. In workshops held pursuant to Finding (15) of the *Ascent Order*, Staff urged the CLECs to move to a 50% termination liability. Although these efforts were largely unsuccessful, no further Commission action was initiated at that time relative to the CLECs' practices. SBC Illinois also stated that it understood, based on its own tariff filings, that a 50% or lower termination liability would be acceptable to Staff and all of its proposed termination liabilities are 50% or lower. Having made these changes based on a good faith assumption that they would fall well within Staff's "range of reasonableness," SBC Illinois stated that Staff's apparent change of heart was baffling.

According to SBC Illinois, the principal difference between the two approaches is that SBC Illinois' forward-looking approach produces higher termination liabilities in the early part of the contract period, while TDS' "give-back-the-unearned-discount" approach produces higher termination liabilities in the latter part of the contract period. SBC Illinois contended that back-ending the termination liability in this manner is actually anticompetitive, because it is at the end of a contract term that customers are most likely to be considering competitive alternatives and competitors are most likely to be wooing customers.

SBC Illinois further argued that TDS' approach also does not comport with common notions of contractual obligation and equity. SBC Illinois contended that customers expect a termination liability to decline over the period of a contract, that is, the more of the contract that the customer completes, the lower the termination liability should be. In fact, customers would always pay a high termination liability towards the end of the contract period under TDS' approach. In response to TDS' argument that termination liabilities should be low in the early part of the contract, SBC Illinois stated that carriers have a reasonable expectation that, having just expended considerable marketing time and resources to woo the customer, their relationship will be stable for some meaningful period of time, and customers expect to be required to fulfill their contractual obligations for some meaningful period of time.

SBC Illinois also pointed out that TDS' approach also does not reflect a reasonable balancing of the risks associated with long-term agreements. SBC Illinois contended that, under the TDS approach, customers are automatically given the best possible deal in terms of rates, i.e., there is no scenario in which a customer would be worse off entering into a term plan with SBC Illinois than subscribing to service on a month-to-month basis. SBC Illinois expressed concern that customers would commit to the longest possible term it offers under this approach, regardless how long they actually intended to stay. SBC Illinois argued that customers should not be encouraged to game the system in this manner. Moreover, SBC Illinois pointed out that having customers enter into agreements that are longer than they would otherwise elect could have the perverse effect of making customers less available, not more available, to competitors.

Furthermore, SBC Illinois contended that TDS' approach would make sophisticated customer-specific networks unworkable. If a customer can terminate a contract essentially at will (subject only to having to give back unearned savings), neither SBC Illinois nor the customer could make any assumption as to the likely duration of the arrangement, which would make the contracting process extremely difficult. SBC Illinois also pointed out that these kinds of networks are not purchased under tariffs that establish alternative rates for alternative term periods and, therefore, there is no way to compute a "payback the savings" early termination liability, because there is no rate for the "next lower completed term."

Finally, SBC Illinois disputed TDS' contention that the fact that relatively few customers switch providers during a term agreement demonstrates that SBC Illinois' termination liabilities are too high. SBC Illinois contended that an equally plausible interpretation of the data is that customers are generally satisfied with the service that they obtain from SBC Illinois and are not inclined to break their contractual commitments early. SBC Illinois further pointed out that TDS had provided no evidence that its customers terminate their term agreements early at a higher rate than SBC Illinois'.

D. COMMISSION ANALYSIS AND CONCLUSION

The Commission is of the view that TDS has not demonstrated that SBC Illinois' termination are anticompetitive or unreasonable. The Commission agrees with SBC Illinois that the *Ascent Order* was based on the facts and arguments presented by the parties in that proceeding and was specific to the services and the termination liability policies in place at that time. The marketplace in Illinois has continued to evolve since then. Any request by a carrier for the Commission to intervene in competitive practices must be based on current market conditions and substantial evidence that those practices are anticompetitive or unreasonable.

SBC Illinois has demonstrated that the marketplace is substantially more competitive today than it was at the time that the ValueLink offerings at issue in the *Ascent Order* were introduced. SBC Illinois also demonstrated that competition for products like Centrex and data transport significantly preceded competition for usage. Thus, business customers do have choices for all of the products at issue in this proceeding and the concerns that prompted us to adopt the methodology in the *Ascent Order* have far less application today.

TDS has not demonstrated that Commission intervention is appropriate. SBC Illinois is no longer using the 100% termination liability policy which we found objectionable in the *Ascent Order*. Rather, its current termination liability policies reflect the legal standards described in the *Ascent Order* and are supported by financial analyses. The Commission is cognizant of the fact that most carriers in the marketplace do not use the "payback the savings" approach preferred by TDS. The fact that TDS is asking the Commission to order a non-standard approach to termination liabilities is of concern. SBC Illinois is correct that the Commission did not intend its *Ascent Order* to mandate a "give back the savings approach" if the carrier could justify another methodology. SBC Illinois' current policies appear to be within a range of reasonableness and do not contravene that *Order*.

For example, TDS has not demonstrated that the absolute amount of SBC Illinois' termination liabilities is unreasonable. The Commission finds persuasive SBC Illinois' analyses which demonstrate that the "payback the saving approach" produces higher termination liabilities than SBC Illinois' approach over more than half of the contract periods evaluated. These analyses do not support TDS' claim that its approach is competitively superior. The Commission notes that SBC Illinois' termination liabilities are now among the lowest in the industry, hardly the indicia of unreasonable or anticompetitive practices.

The Commission also finds unpersuasive TDS' contention that termination liabilities should be lowest at the front end of a contract period before the customer has completed any significant portion of its contractual obligations. As SBC Illinois points out, this structure is contrary to standard practice in competitive industries and runs counter to the normal expectations of both carriers and customers. Although TDS is free to use this approach in its agreements, the Commission does not believe it should be imposed on SBC Illinois.

TDS has also failed to demonstrate that these policies have the effect of locking up the market. The Commission recognizes that all termination liabilities have the effect of deterring changes of provider during the contract period. However, such effects are offset by the corresponding willingness of carriers to offer discounted rates and/or build custom networks designed to specifically meet the needs of individual customers. SBC Illinois demonstrated that a substantial majority of its customer base is available to CLECs at any given point in time and that customers are constantly rolling off these agreements. TDS did not dispute this analysis. Accordingly, the Commission will not interfere with the contractual provisions which SBC Illinois is currently using in its term agreements.

III. STAFF'S RULEMAKING PROPOSAL

A. STAFF'S POSITION

B. TDS' POSITION

C. SBC ILLINOIS' POSITION

SBC Illinois agreed with Staff that, if the Commission concluded that only TDS' approach to termination liabilities is lawful, then it should be imposed in an even-handed manner on all carriers in Illinois. SBC Illinois also agreed with Staff that a rulemaking proceeding would be the appropriate means of achieving that result. However, SBC Illinois stated that neither Staff nor TDS had met that burden. According to SBC Illinois, at most TDS and Staff had demonstrated that "give-back-the-unearned-discount" is an approach that could be used by a carrier in Illinois, but they had not demonstrated that it must be used.

SBC Illinois argued that the Commission should not initiate a rulemaking proceeding lightly. SBC Illinois noted that all parties agreed that such a proceeding would be costly and burdensome. Based on past experience in the workshops, SBC Illinois stated that all of the CLECs in Illinois (other than TDS) would likely object to the imposition of TDS' termination liability approach on them by regulatory fiat and this should be factored into the Commission's analysis. According to SBC Illinois, the mere fact of a rulemaking will disrupt competitive behavior in the Illinois marketplace, because it will cast a cloud over carriers' contracting policies. SBC Illinois argued that carriers will not know whether they can rely on their existing termination liability policies when developing service discounts or pricing customer-specific networks, thus chilling such offers during the pendency of the rulemaking proceeding.

SBC Illinois also contended that regulating termination liabilities could adversely affect customers. SBC Illinois explained that pricing is at the heart of the competitive marketplace and noted Staff's agreement that there is an integral relationship between the prices that carriers offer customers (i.e., the level of discount) and the termination liability policy that they can apply. SBC Illinois also pointed out that a carrier's willingness to provide customers with custom telecommunications solutions is directly related to termination liabilities that allow it to fully recoup losses in the event of early termination. Therefore, SBC Illinois urged the Commission to be extremely cautious about regulating carrier conduct that directly affects both prices and service. SBC Illinois also contended that adopting industry-wide guidelines in this area would run counter to this Commission's long-standing, procompetitive policies.

SBC Illinois pointed out that the Illinois Public Utilities Act does not contemplate regulatory intervention into carriers' contracting practices just to achieve a "better" competitive result, as Staff proposes. According to SBC Illinois, Section 13-509 of the Act allows companies to enter into contracts on an "off tariff" basis for competitive services and contract terms can be altered by the Commission only in the event of severe financial risk to the carrier or unlawfulness. SBC Illinois contended that neither Staff nor TDS had established that its approach to termination liabilities is unlawful.

SBC Illinois contended that Staff bears a substantial burden to justify requiring that the entire industry in Illinois embark on an expensive and potentially risky examination of termination liabilities policies. SBC Illinois fully agreed with Staff that the Commission should treat all carriers on an even-handed basis. However, according to SBC Illinois, the record in this proceeding demonstrates that parity of treatment should be achieved by permitting carriers to make their own decisions, and by allowing the marketplace to discipline carriers that exceed the bounds of what customers will accept in the way of termination liabilities.

D. COMMISSION ANALYSIS AND CONCLUSION

The Commission will not adopt Staff's rulemaking proposal.

The Commission agrees with Staff that any regulatory requirement in this area should be applied even-handedly to all carriers in the marketplace. This is necessary not only as a matter of fundamental fairness to SBC Illinois, but also to ensure that regulation does not tip the competitive scale in favor of one set of competitors over another. Therefore, if the Commission were to take any action in this proceeding, it would follow Staff's rulemaking proposal.

However, the Commission is of the view that the record in this proceeding does not warrant our intervention. As we found above, SBC Illinois' termination liability policies are not inconsistent with the standards in the *Ascent Order* and are not out-of-line with standard practice in the industry. Since SBC Illinois' practices are reasonable, this does not appear to be an appropriate context in which to embark on regulations that would impact all carriers. The Commission is also reluctant to initiate a proceeding that could negatively impact the willingness of carriers to discount their rates or construct specialized networks. This could have an adverse impact on customers and the competitive process. If customers do not like the termination liability policies used by SBC Illinois or any carrier, they are free to take service from another provider.

The Commission notes Staff's concern that other carriers could file similar complaints. By this order, however, the Commission intends to signal to carriers in Illinois that they should focus their competitive efforts in the marketplace, not the hearing room. The Commission will, of course, always address contentions that practices are unlawful under Sections 13-514 or 9-250 of the Act and does not intend to discourage such complaints. However, the Commission does not intend to micromanage carriers' competitive practices just to achieve what some parties might perceive as a better competitive result. To the extent TDS believes that its termination liability approach is superior from a customer perspective, it is free to use it as a marketing tool.

IV. CALCULATION OF TERMINATION LIABILITIES

A. TDS' POSITION

B. SBC ILLINOIS' POSITION

SBC Illinois took the position that the Commission should reject TDS' proposal that it be required to calculate termination liabilities for CLECs. SBC Illinois explained that, under Finding (10) of the *Ascent Order*, it is obligated to calculate the charges that would be due in the event that a ValueLink customer terminates an agreement early; such calculations must be performed within three business days of receipt of the request; and the requests may be from either the customer directly or from a CLEC that has been designated as the customer's agent. SBC Illinois pointed out that this calculation obligation had been adapted from an Ohio order and that the Commission had adopted it to obviate the need for future litigation regarding implementation of the *Ascent Order*. *Ascent Order* at 29-30.

SBC Illinois contended that TDS' proposal would be unduly burdensome. Because SBC Illinois has not mechanized the process of calculating termination liabilities, it explained that every request had to be responded to manually. According to SBC Illinois, this process is more cumbersome and time-consuming when a CLEC is involved than when the Company is dealing directly with the customer. SBC Illinois stated that it simply did not have enough managers in the workgroup responsible for calculating termination liabilities to respond to both customer and CLEC requests and that it would have to add personnel if Finding (10) of the *Ascent Order* were expanded.

In response to this burden issue, TDS offered to extend SBC Illinois' response interval from three business days to five business days. According to SBC Illinois, an additional two days would accomplish nothing; even an extra month would not accomplish much. SBC Illinois stated that there would simply be too many CLEC requests for SBC Illinois to process with its existing workforce, which is why the Company scaled back the services for which it would perform these calculations to comply just with the *Ascent Order* requirements. Similarly, contrary to TDS' suggestion, SBC Illinois stated the burden should not be placed on it to develop a series of forms to discourage unfocused or inaccurate CLEC requests. According to SBC Illinois, CLECs should learn how to perform these calculations themselves – as many apparently have – or work through the customer.

SBC Illinois disputed TDS' contention that it cannot compete for customers without obtaining this information directly from SBC Illinois. SBC Illinois stated that CLECs can obtain tariffs as well as documentation from the customer that, in many instances, would allow CLECs to estimate the termination liability themselves. SBC Illinois also pointed out that CLECs could obtain termination liability calculations from SBC Illinois through the customer. SBC Illinois disputed TDS' contention that relying on customers to make the request is unworkable because customers may fail to make or pursue the request with SBC Illinois. SBC Illinois argued that TDS' argument supports its contention that many of the CLEC-generated requests involve customers who have little or no real interest in changing providers and that the Company is performing calculations for CLECs on fishing expeditions.

SBC Illinois further argued that the expanded obligation proposed by TDS is inappropriate in a competitive marketplace. According to SBC Illinois, CLECs ask it to perform these calculations largely because it is easy and costless, compared to having their own employees spend time doing so. SBC Illinois argued that the CLECs have made SBC Illinois' employees part of their sales staffs and that this is not an appropriate role for it to play. SBC Illinois particularly objected to new obligations that would require it to add headcount, while the CLECs avoid incurring any costs of their own. SBC Illinois further pointed out that a small number of CLECs are responsible for the vast majority of CLEC requests for calculation of termination liabilities; other CLECs perform more of the calculations "in house" and/or work through the customers directly.

SBC Illinois further argued that TDS' proposal is inconsistent with the general operation of the marketplace. SBC Illinois pointed out that CLECs do not routinely perform these calculations for other carriers (whether SBC Illinois or another CLEC). For example, when SBC

Illinois' sales team is competing for a customer under a term agreement with a CLEC, SBC Illinois explained that it works with the customer to determine what agreements they have entered into and SBC Illinois calculates the potential termination liability itself.

SBC Illinois pointed out that no other state commission in the SBC Midwest region imposes such a requirement. Although Finding (10) of the *Ascent Order* was modeled on an Ohio Commission order, according to SBC Illinois, it is no longer operative. SBC Illinois explained that it was a one-time event when competition for local exchange service was first authorized in Ohio and it expired for SBC Ohio years ago. SBC Illinois contended that the Ohio requirement, like the *Ascent* Order requirement, was viewed as necessary when competition was first taking hold and, with the maturation of the competitive marketplace since then, there was and is no reason to continue these obligations.

SBC Illinois disputed TDS' contention that the mere fact that the CLEC has a written agency letter automatically obligates SBC Illinois to perform these calculations. SBC Illinois noted that TDS had not cited to any existing Commission authority to support this proposition. Although agency letters are used for certain purposes in the telecommunications industry (e.g., to support requests to change providers submitted on behalf of retail customers by carriers), SBC Illinois stated that these requirements are narrowly targeted and have generally followed extensive regulatory proceedings, citing the PIC change rules in Section 13-902 of the Public Utilities Act. SBC Illinois pointed out that no such general obligation exists here.

SBC Illinois argued that TDS' reliance on Finding (10) of the *Ascent Order* hurt its position, not helped it. SBC Illinois contended that, if SBC Illinois were legally obligated to perform such calculations for CLECs just because they have an agency letter, there would have been no need for Finding (10) at all because SBC Illinois would have been required to do this work for CLECs as a matter of course. Similarly, SBC Illinois argued, there would have been no need for the Ohio Commission to impose a calculation obligation on SBC Ohio as CLECs first entered its local markets.

SBC Illinois also disputed TDS' contention that working through the customer is inappropriate because SBC Illinois would have the opportunity to persuade the customer not to leave. According to SBC Illinois, this is part and parcel of the competitive marketplace. SBC Illinois stated that the principal issue is whether the customer benefits and, in its view, the customer would be better off if SBC Illinois and TDS can respond to each other's proposals. SBC Illinois described TDS' proposal as erecting a wall between SBC Illinois and its own customer and stated that this would be anti-competitive, not pro-competitive.

Finally, SBC Illinois responded to TDS' contention that this issue had been properly disposed of in the electric and gas industry. SBC Illinois pointed out that TDS had provided no citations to any Commission orders to support its claim, nor had it demonstrated that the functions it cited are comparable to what is at issue in this proceeding. SBC Illinois noted that it does accept requests from CLECs and IXCs to switch customers based on valid agency authority and that it provides CLECs with a substantial amount of customer-specific billing information as part of the pre-ordering processes. *Order in Docket No. 01-0662,* adopted May 13, 2003, at 102-03. SBC Illinois argued that these practices appear to be comparable to those cited by TDS for the gas and electric industries.

C. COMMISSION ANALYSIS AND CONCLUSION

The Commission will not require SBC Illinois to calculate termination liabilities for CLECs upon request. The Commission agrees with SBC Illinois that Finding (10) of the *Ascent Order* was limited to that proceeding and that it should not be expanded. There appear to be adequate avenues for CLECs to obtain the information they desire when competing for customers under term agreements with SBC Illinois without imposing such an obligation.

Even if the Commission found TDS' proposal to be justified, which it does not, it would not impose such an obligation on SBC Illinois alone. Any such requirement should apply equally to all carriers. No party proposed a rulemaking proceeding to address this issue. Moreover, for many of the reasons cited by SBC Illinois, the Commission is not persuaded that such a rulemaking proceeding would be necessary or appropriate.

V. TDS' REQUEST FOR REIMBURSEMENT OF FEES AND EXPENSES

A. TDS' POSITION

B. SBC ILLINOIS' POSITION

SBC Illinois contended that it should not be required to reimburse TDS for its legal fees and expenses. According to SBC Illinois, TDS is only entitled to such costs under Section 13-516 (a)(3) if the Commission finds that SBC Illinois violated Section 13-514 of the Act. Section 13-514 prohibits carriers from "knowingly imped[ing] the development of competition in any telecommunications service market." SBC Illinois argued that TDS had not made any such showing in this proceeding. SBC Illinois contended that TDS had failed to show that SBC Illinois' termination liability policies impede competition at all or that those policies were adopted in a "knowing" attempt to do so. Therefore, according to SBC Illinois, there is no factual basis on which an award of attorney's fees and related costs could be made.

SBC Illinois disputed TDS' contention that it should be awarded attorney's fees and expenses even if the Commission approves SBC Illinois' current termination liability policies because its complaint prompted SBC Illinois to revise them. SBC Illinois pointed out that Section 13-516, like other fee-shifting statutes, is to be strictly construed. *Globalcom, Inc. v. Ill.*

Comm. Comm. and Ill. Bell Telephone Co., Nos. 1-02-3605, 1-03-0068 Consol., slip op. at 36 (1st Dist. 2004). Thus, according to SBC Illinois, the Commission must find a violation of Section 13-514 to require SBC Illinois to reimburse TDS for its expenses. Nothing in Section 13-516 contemplates such payments if a carrier modifies its policies voluntarily. SBC Illinois argued that the issue is whether SBC Illinois' current policies are anticompetitive, and they are not.

SBC Illinois also disputed TDS' contention that the original termination liability policies it used prior to the modifications adopted at the outset of this proceeding were anticompetitive or adopted with the intent of impeding competition. SBC Illinois argued that, although it had urged the Commission to resolve the disputed issues in this proceeding based on its modified policies, that does not mean that its prior policies were unlawful. In its Rebuttal testimony, SBC Illinois pointed out that, for usage products not subject to the *Ascent Order*, termination liabilities since 2002 have ranged from 35% to 50% and that these levels are fully supported by both SBC Illinois' financial analysis and Staff's informal guidelines used in the workshops. Therefore, according to SBC Illinois, they cannot be considered anticompetitive. SBC Illinois noted that the majority of transport products were previously subject to a "give-back-the-unearned-discount" methodology, an approach which Staff and TDS support and, therefore, cannot be considered anticompetitive. According to SBC Illinois, the only major product whose termination liability historically exceeded 50% is Centrex, which typically had been subject to an 85% termination liability (although customers were allowed to disconnect up to 20% of their lines before the termination liability was charged). Although SBC Illinois has lowered this amount to 25%, it explained that its prior Centrex termination liability was fully justified in light of then prevailing market conditions, because Centrex lines lost to competitive providers were not reused by other customers. SBC Illinois further noted that most CLECs offering Centrex service charge 100% termination liabilities. Therefore, argued SBC Illinois, TDS' contention that it had not attempted to justify its prior policies in testimony was factually incorrect, and there was no record evidence that would support a finding that they were unlawful.

SBC Illinois further pointed out that the TDS Complaint did not cause SBC Illinois' change in policy. Rather, according to SBC Illinois, it simply accelerated a process that was already underway. SBC Illinois explained that it had already concluded that its termination liability policies needed to be rationalized for business and marketing reasons and that tariffs for new products and services were being filed with termination liabilities consistent with the new policies and older tariffs were being updated as other changes were made. SBC Illinois argued that the fact that TDS' Complaint prompted SBC Illinois to move up its internal timetable, and to incur the costs and disruption associated with implementing these changes all at once, is not grounds for imposing yet more costs on SBC Illinois.

SBC Illinois further noted that it announced these changes in December of 2003, shortly before TDS filed its direct testimony. According to SBC Illinois, any benefits which TDS' Complaint conferred on customers and competitors were complete at that point, and any legal expenses and costs incurred by TDS since December have been entirely at TDS' discretion. SBC Illinois explained in testimony that the lag time between December 2003 and the March 2004 implementation of these new policies was due to the need for internal work. SBC Illinois further noted that TDS' testimony and briefs have been directed at persuading the Commission to adopt TDS' approach to termination liabilities (not at supporting the revisions SBC Illinois announced in December), causing SBC Illinois to incur considerable litigation costs, including the expenses associated with an outside economist. SBC Illinois argued that it should not be required to pay legal expenses and costs incurred by TDS to contest the very policies that TDS now concedes the Commission may approve.

C. COMMISSION ANALYSIS AND CONCLUSION

TDS' request that the Commission award it its attorney's fees and expenses is denied. The Commission has not found SBC Illinois' current termination liability policies to be anticompetitive under Section 13-514 and, therefore, there is no basis for such an award. TDS has also not established a record which would support a conclusion that SBC Illinois' prior termination liability policies were anticompetitive. The Commission recognizes that SBC Illinois did defend them in testimony and that TDS did not respond to this testimony.

The Commission also concludes that Section 13-514(a)(3) does not contemplate the award of attorney's fees and costs just because the filing of a complaint prompts a carrier to make voluntary changes in its practices. The Commission notes that TDS chose to pursue this complaint after SBC Illinois announced its changed policies in December of 2003, and, thus, cannot ascribe costs incurred thereafter to SBC Illinois in any event.

VI. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having given due consideration to the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) Illinois Bell Telephone Company is an Illinois corporation engaged in the business of providing telecommunications services to the public in the State of Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Illinois Public Utilities Act;

(2) the Commission has jurisdiction over Illinois Bell Telephone Company and the subject matter of this proceeding;

(3) the recital of facts and law and conclusions reached in the prefatory portion of this Order are supported by the record, and are hereby adopted as findings of fact and conclusions of law for purposes of this Order;

(4) SBC Illinois' termination liability policies are not unlawful or anticompetitive under Sections 13-514 or 9-250 of the Illinois Public Utilities Act;

(5) SBC Illinois' obligation to calculate termination liabilities for CLECs should not be expanded beyond what is required by the Commission's Order in Docket No. 00-0024 (the *Ascent Order*);

(6) Complainant's claim for reimbursement should be denied;

(7) the Complaint should be denied;

(8) the materials submitted by the parties in this proceeding on a proprietary basis or for which proprietary treatment was requested are hereby considered proprietary and should continue to be accorded proprietary treatment;

(9) any petitions, objections or motions that have not been specifically disposed of should be disposed of in a manner consistent with our conclusions herein.

IT IS THEREFORE ORDERED that the Complaint filed by TDS Metrocom, LLC against Illinois Bell Telephone Company be, and is hereby, denied.

IT IS FURTHER ORDERED that any materials submitted in this proceeding for which proprietary treatment was requested shall be accorded proprietary treatment.

IT IS FURTHER ORDERED that any petitions, objections or motions made in this proceeding and not otherwise specifically disposed of herein are hereby disposed of in a manner consistent with the conclusions contained herein.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200-880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this ___________ day of _________________, 2004.

Chairman

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

____

One of Its Attorneys

Louise A. Sunderland
SBC Illinois
225 West Randolph Street
Floor 25D
Chicago, IL 60606
312/727-6705

CERTIFICATE OF SERVICE

I, Louise A. Sunderland, an attorney, certify that a copy of the foregoing **DRAFT PROPOSED ORDER OF SBC ILLINOIS** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on July 2, 2004.

Louise A. Sunderland

SERVICE LIST FOR ICC DOCKET NO. 03-0553

Terrence Hilliard
Illinois Commerce Commission
160 North LaSalle, Suite C-800
Chicago, IL 60601-3104
thilliard@icc.state.il.us

Brandy Brown
Illinois Commerce Commission
160 North LaSalle, Suite C-800
Chicago, IL 60601-3104
bbrown@icc.state.il.us

Peter R. Healy
TDS Metrocom, Inc.
525 Junction Road
Suite 6000
Madison, WI 53717
peter.healy@tdsmetro.com

Robert Koch
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
rkoch@icc.state.il.us

Michael J. Lannon
Illinois Commerce Commission
160 North LaSalle, Suite C-800
Chicago, IL 60601-3104
mlannon@icc.state.il.us

Owen E. MacBride
Schiff Hardin & Waite
233 South Wacker Drive
6600 Sears Tower
Chicago, IL 60606
omacbride@schiffhardin.com

Sanjo Omoniyi
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
somoniyi@icc.state.il.us